

# PROBATE

## 1. QUESTION: WHAT IS PROBATE?

ANSWER: Probate is the procedure of settling the estate of a deceased person. The estate of one who has died consists of the property that person owned upon death. Probate re-titles a decedent's property and puts it into the designated beneficiary's name. A person's estate is probated in the domicile (or legal residence) of that deceased person. The legal residence means the place where one is entitled to vote, is required to pay state income taxes, and considers (through words and actions) to be his or her home. When the courts try to determine this, they often look at where a person owns a home, where the person's car is titled and registered, where one's driver's license is issued, and where a person has bank accounts. For California probates, an excellent resource is *How to Probate an Estate in California*, Nolo Press.

## 2. QUESTION: WHO IS RESPONSIBLE FOR PROBATING MY ESTATE?

ANSWER: If you have made a will, you have probably named such a person, called an Executor or Personal Representative, in that document. If you have no will, the court will appoint someone, usually a family member, to be the Administrator of your estate for this purpose.

## 3. QUESTION: WHAT ARE THE DUTIES OF MY EXECUTOR OR PERSONAL REPRESENTATIVE?

ANSWER: The executor's duties are the same as those of the administrator. They include the obligations to:

- a. Safeguard the property and assets of the estate;
- b. Inventory (or make a list of) the property;
- c. Submit accounts or inventories to the court as required;
- d. Pay the debts and expenses of the deceased (such as funeral and burial expenses, medical expenses, and credit card bills);
- e. Pay any federal or state death taxes (California has no death tax); and
- f. Distribute the estate to those named in the will or, if no will exists, to your heirs as designated by statute.

## 4. QUESTION: WHO PAYS FOR ALL THIS?

ANSWER: Your estate does. In general, your estate is responsible for all your debts, bills and expenses. These must be paid before any remaining assets can be given to your heirs or your beneficiaries under the will. Your executor has no duty to pay these costs out of his or her own pocket. Your executor must release enough of your assets to allow the payment of these expenses.

## 5. QUESTION: IF I AM APPOINTED AS SOMEONE'S EXECUTOR, DO I GET PAID?

ANSWER: An executor or an administrator -- can request the court to allow payment:

- a. For out-of-pocket expenses, such as postage stamps, bank charges and mileage; and
- b. For services rendered as an executor or administrator unless the will directs otherwise.

The amount of this latter payment will vary, of course, depending on the amount of work done, the time spent working on the estate, the complexity of the work and the size of the estate.

**6. QUESTION: DOES MY EXECUTOR HAVE TO PAY A FEE OR POST A BOND TO SETTLE MY ESTATE?**

**ANSWER:** Ordinarily an executor or administrator will have to post a bond if he or she is from outside the state where the probate takes place or if he or she is administering assets for minor children. A will can waive the posting of a bond.

**7. QUESTION: HOW DOES MY EXECUTOR NOTIFY MY CREDITORS?**

**ANSWER:** It is the duty of the executor or administrator to notify directly by mail any creditors who are known at the time of your death. Your executor/administrator must also place a legal notice in the local newspaper informing creditors of your death. This is done shortly after your executor/administrator has been appointed by the court to handle your estate. The newspaper notice must:

- a. Give the name of the deceased and the name and address of the executor or administrator;
- b. Be published once a week for four weeks in the locality where the deceased had his or her home; and
- c. State that all claims of creditors must be made within three months of publication of the notice (other states may have varying periods for these claims, usually six months after publication of the notice).

Once this is done, the publisher prepares an Affidavit of Publication and this is put in the court file. The executor or administrator pays for this notice with the funds of the estate. Any claims not presented to the executor or administrator within this period need not be paid under most state laws. Those claims which are held valid and which are presented within this period, including any other debts and expenses known to the executor or Administrator, must be paid out of the available funds in the estate.

**8. QUESTION: HOW DO I HANDLE THE MONEY OF THE DECEASED?**

**ANSWER:** First set up an estate account at a bank as soon as you have been appointed executor or administrator. You can arrange this at any local bank. There is a small charge for printing the checks showing your name and address, your title (executor/administrator), and the name of the deceased. Having a separate account prevents the mixing or "commingling" of your own personal funds and those of the estate. With this fund set up, you can deposit or transfer the funds of the deceased into this separate account. Some items, such as paychecks, insurance premium refunds or employee death benefits, may be deposited directly into the estate account.

**9. QUESTION: ARE LIFE INSURANCE PROCEEDS PART OF THE ESTATE?**

**ANSWER:** For tax purposes, life insurance proceeds are counted as part of the taxable estate if the policy was owned by the deceased. You must account for the proceeds of such a policy on the tax return (state and, if necessary, federal) of the estate. On the other hand, only life insurance proceeds payable to the estate are listed on the formal inventories filed with the Clerk. Those policies and proceeds made payable to individual beneficiaries pass by contract, outside of the estate, directly to the named beneficiary.

**10. QUESTION: HOW IS REAL ESTATE HANDLED & IS A NEW DEED REQUIRED FOR LAND THAT IS PASSED ON BY THE DECEASED?**

**ANSWER:** Some states require that a new deed be made. In addition, you should know that any real estate owned in part or wholly by the deceased in another state will have to be separately probated in that state. This is sometimes called an ancillary probate, and it often requires hiring an attorney (or at least consulting with one) in the second state so that the land is properly transferred to the intended recipient under the laws of that state.

Personal property is only probated in the state of legal residence of the deceased. This is true regardless of where the personal property is located at the time of death. If, for example, SGT Jones is a legal resident of Texas but dies in Florida in a car accident, the personal property he has with him in Florida would still be subject to probate only in Texas.

11. QUESTION: ONCE I HAVE PAID ALL THE FEES AND EXPENSES AND ACCOUNTED FOR ALL THE PROPERTY, HOW DO I CLOSE THE ESTATE?

ANSWER: The steps are as follows:

(1) A federal tax return is only required where a decedent's gross estate exceeds \$1,000,000 through 2008; the amount will increase \$1,750,000 in 2009.

(2) The next step is to distribute the estate among the heirs-at-law (if there is no will) or the designated beneficiaries (if a will has been admitted to probate). You should obtain a receipt from all heirs or beneficiaries stating that they have received their entire share of the estate of the deceased (signed, dated and witnessed).

(3) After you have distributed or divided the property, submit those receipts along with the final inventory to the Clerk's Office. You will also need cancelled checks or "paid receipts" for all expenses, fees and bills that have been paid. Once the clerk is satisfied that you have accounted for all assets and expenses and you have properly distributed the assets and property, the estate will be closed.

12. QUESTION: WHAT IF I HAVE OTHER QUESTIONS?

ANSWER: See a legal assistance attorney or private attorney. Seeing a lawyer early may not only solve a problem you have, but it may also resolve or avoid a problem in the future, on this or other unrelated subjects. Our legal assistance office stands ready, willing and able to help you in these matters.